(2) 92-1308
No. 92-1067 (4)

Supreme Court, U.S.
FILED
FEB 12 1993
OFFICE OF THE CLERK

In The
Supreme Court Of The United States
October Term, 1992

STATE OF CONNECTICUT,
Petitioner,

v.

KARIN APARO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Counsel of Record:

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

RICHARD N. PALMER
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS
Assistant State's Attorney
Director of Operations

SUSANN E. GILL
Supervisory Assistant State's Attorney
Appellate Unit

12 pp

QUESTIONS PRESENTED

I. **Did the Connecticut Supreme Court correctly hold that the Double Jeopardy Clause does not bar retrial of the conspiracy count, where the jury at the first trial deadlocked seven to five for acquittal on that count?**

II. **Did the Connecticut Supreme Court correctly conclude that the doctrine of collateral estoppel does not bar retrial, because the cross-petitioner failed to demonstrate that the jury, in acquitting her on the murder count, had actually decided an element of the conspiracy count in her favor?**

TABLE OF AUTHORITIES

PAGE

CASES

Dowling v. United States, 493 U.S. 342 (1990) 4

Illinois v. Gates, 462 U.S. 213 (1983) 2

State v. Aparo, 223 Conn. 384 (1992) 2, 3, 5, 6

United States v. DeVincent, 632 F.2d 155, (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) 4

United States v. Johnston, 268 U.S. 220 (1925) 6

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 3, 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in relevant part):

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . .

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48(a):

Conspiracy. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception' except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

The cross-respondent hereby adopts and incorporates the Statement of the Case set forth in the state's Petition for Certiorari at pages 7-11.

REASONS FOR DENIAL OF THE CROSS-PETITION

I. The Cross-Petition Cites No Precedent Or Relevant Authority For The Contention That The Double Jeopardy Clause Bars Retrial Of The Conspiracy Count Where The Twelve-Member Jury Deadlocked Seven To Five In Favor Of Acquittal On The Mistried Count

The cross-petitioner elected to be tried before a jury of twelve. She now contends that because she had initially had a statutory right to have the conspiracy count tried to a six person jury, and six persons on the deadlocked jury voted for acquittal, retrial is precluded by the double jeopardy protection against a second prosecution for the same crime.[1]

---

[1] In her cross-petition to this Court the cross-petitioner raises for the first time a due process ground for this claim. This case was before the Connecticut Supreme Court on an interlocutory appeal (continued...)

The Connecticut Supreme Court rejected this claim, noting that, pursuant to Connecticut's statutory scheme on jury trials, "had the defendant preferred a jury of six, she could have so elected." *State v. Aparo*, 223 Conn. at 388. The state supreme court also concluded that, in light of "settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous" the vote tally of the deadlocked jury was "legally irrelevant." *State v. Aparo*, 223 Conn. at 388.[2] The cross-petitioner has not demonstrated that the state court's pronouncements on state law violate the federal constitution or otherwise raise any federal question.

---

[1](...continued)
challenging on double jeopardy grounds the denial of a motion to dismiss. Because the due process ground was neither raised or decided in the Connecticut Supreme Court, it is not properly before this Court and should not be reviewed. Illinois v. Gates, 462 U.S. 213, 218 (1983)(only in exceptional cases arising in federal courts will this Court consider claims not pressed or passed upon below).

[2] The state supreme court also recognized that this claim could not be addressed without rank speculation regarding the composition of a six person jury had the cross-petitioner so chosen that number of jurors for her jury trial. *State v. Aparo*, 223 Conn. at 388.

The cross-petitioner fails to point to any precedent for her contention that retrial after deadlock is constitutionally barred by the double jeopardy clause. She proffers, as sole support for her claim, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), which is factually and legally inapposite. The cross-petitioner contends that that case stands for the proposition that an acquittal can arise from a situation other than a unanimous jury verdict. In *Martin Linen Supply Co.*, the trial court granted the defendant's motion for a judgment of acquittal after the jury had deadlocked. Thus a final judgment of acquittal was entered and the government was precluded from taking an appeal.

By contrast, the trial court in the instant case declared a mistrial on the deadlocked conspiracy count. *State v. Aparo*, 223 Conn.384,386 (1992); Appendix To Petition at 3A. As a result, no final judgment of acquittal was ever entered on that count, and jeopardy has not yet terminated on the conspiracy charge. *Richardson v. United States*, 468 U.S. 317 (1984). Thus the deadlock in this case bears no similarity to the judgment of acquittal in

II. The Connecticut Supreme Court's Conclusion That The Cross-Petitioner Failed To Show That The Jury Actually Decided An Element Of The Conspiracy Count In Her Favor Is Fact-Bound And Does Not Raise A Substantial Federal Question

The cross-petitioner contends that the Connecticut Supreme Court erred in rejecting her claim that the jury, by acquitting her of murder, necessarily decided elements of the mistried conspiracy count in her favor. *See Dowling v. United States*, 493 U.S. 342, 350 (1990)(defendant bears burden of showing that issue was actually decided in her favor); *United States v. DeVincent*, 632 F.2d 155, 158-59 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (defendant did not show that acquittal on first count involved determination of any element of second mistried count). In considering the cross-petitioner's claim, the Connecticut Supreme Court was fully cognizant that the collateral estoppel doctrine is not to be applied in a "technically restrictive manner." *State v. Aparo*, 223 Conn. at 390; Appendix To Petition at 7A. There is

nothing to substantiate the cross-petitioner's contention that the state court acted in an unreasonable or irrational manner in applying the collateral estoppel doctrine.

A court's inquiry into what the first jury actually determined is necessarily fact-bound and may require a painstaking review of all of the record. Here the trial court, in denying the motion to dismiss, performed a careful analysis of the evidence at the first trial, and the Connecticut Supreme Court in reviewing that ruling did the same. 223 Conn. at 393-401; Appendix To Petition at 10A-18A. In asking this Court to perform the same evidentiary review already performed by the state courts, the cross-petitioner misperceives the nature of the writ. This Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.).

Additionally, the cross-petitioner has failed to raise a substantial federal question. The state courts' conclusion that the first jury did not actually decide an element of the mistried conspiracy count in the defendant's favor has little or no significance outside the

circumstances of this case.[3]

The cross-petitioner also contends that the trial court's jury instructions "collapsed the distinction between the accessory statute and the conspiracy statute." Cross-Petition at 19. The state supreme court rejected her interpretation of the statutory and instructional language involved. *State v. Aparo*, 223 Conn. at 401-2 n.61; Appendix To Petition at 18A-19A.[4] The cross-petitioner

---

[3] Moreover, as the state argued below, if the jury in acquitting the cross-petitioner on the murder count had unanimously agreed that she lacked the specific intent to kill, they would have acquitted her not only of murder, but also of conspiracy to commit murder, which contained the element of intent to kill. *See*, *State v. Aparo*, 223 Conn. at 401-2; Appendix To Petition at 18A-19A (explaining elements of the crimes charged). The fact that some jurors voted for conviction on the conspiracy count refutes the cross-petitioner's claim that the jury actually concluded that she lacked the intent to kill her mother when they unanimously acquitted her of murder.

[4] The Connecticut Supreme Court held that the challenged instruction, when considered in context, "did not permit the jury to substitute a conspiracy for [the accessorial] acts[,]" nor did it equate "intent to join" with any accessorial act, or with the conspiratorial act of entering into an agreement. *State v. Aparo*, 223 Conn. at 401-2 n.6; Appendix To Petition at 18A-19A. The state supreme court expressly found that the challenged instruction "did not weaken the

(continued...)

is merely asking this Court to delve into the idiosyncracies of a state trial court's jury charge. Such a claim is not constitutional in nature and is not worthy of this Court's certiorari jurisdiction.

RESPECTFULLY SUBMITTED,

STATE OF CONNECTICUT

CROSS-RESPONDENT

JUDITH ROSSI
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
Tel. (203)265-2373
Federal Bar No.ct 07360
COUNSEL OF RECORD

February, 1993

---

[4](...continued)
state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts." *Id.*